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Supreme Court, U.S.
FILED
APR 18 1998
CLERK

No. 97-1517

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MCCLATCHY NEWSPAPERS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITIONER

GERARD C. SMETANA*
SMETANA & AVAKIAN
Suite 1218
39 South La Salle Street
Chicago, Illinois 60603
(312) 357-0250

Attorney for *Amicus Curiae*
Council on Labor Law Equality
**Counsel of Record*

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BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Council on Labor Law Equality ("COLLE") is a voluntary national association of large and small employers formed in 1981 to monitor the activities of the National Labor Relations Board ("Board"), related developments under the National Labor Relations Act, and to provide support to employer interests on issues that affect a broad section of industry.[1] COLLE's formation recognizes the need for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions to maintain a balanced approach in the formation and interpretation of national labor policy.

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[1]This brief is submitted by the Council on Labor Law Equality ("COLLE"), as amicus curiae in support of petitioner. The parties have consented to the filing of this brief. Copies of their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae COLLE certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity other than COLLE and its counsel made any monetary contribution to the preparation or submission of this brief.

The manner in which the Court resolves the legal issues under review herein is extremely important to employers throughout the nation. The Board's decision in *McClatchy Newspapers, Inc.*, 321 N.L.R.B. No. 174 (1996), *enf'd*, 131 F.3d 1026 (D.C. Cir. 1997), involves a principle section of the National Labor Relations Act ("Labor Act") designed to preserve an employer's right to manage its business. However, the Board's decision emasculates that right and sweeps aside over 30 years of case law originating from this Court that articulated the importance of employer business interests: *NLRB v. Katz*, 369 U.S. 736, 745 (1962) ("Katz") and *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970).

The National Labor Relations Board's order alters management's lawful expectation and ability to control wages after reaching a good-faith impasse between it and the employee representative. The Circuit Court allowed the Board to disturb this collective bargaining practice under the Labor Act. That action grants the Board the power to judge an employer's contract terms imposed after impasse.

COLLE's participation as *amicus curiae* will assist the Court in obtaining full consideration of the public-interest issues.

QUESTIONS PRESENTED

Whether the Board's new employer requirement to set forth specific criteria for "fixed standards" and timing in merit pay provisions prior to impasse, is an unlawful intrusion into the collective bargaining process of the type this Court forbade in *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 408 (1952).

STATEMENT OF THE CASE

Petitioner McClatchy Newspapers, Inc. ("McClatchy") is a newspaper publishing company. It owns both the Modesto Bee and the Sacramento Bee.

Prior to 1986, McClatchy and its represented employees through the Northern California Newspaper Guild, Local 52, had a

collective bargaining agreement that contained wage classifications with minimum salary floors and step increases. The agreements also provided for a system in which an employee at the top of the wage scale could receive merit pay. The amount and timing of merit pay increases were in McClatchy's discretion. Employees could appeal a merit pay determination with Guild participation.

Two months before the April 1986 expiration of their agreement at issue here, the parties began bargaining. The union requested a 25% wage increase and elimination of merit pay. McClatchy offered to reserve the right to eliminate the past minimum salary and step structure and proposed that it retain the right to implement merit pay exclusively.

A year later, after over twenty bargaining sessions, and after federal mediation, bargaining broke down and McClatchy made its "last, best, and final offer" to the Guild. That proposal maintained the minimum wage classification structure and with a few exceptions for certain employees, made future wage increases solely based on merit pay. As in the prior merit pay provisions between the parties, all decisions on merit pay decided by McClatchy were exempt from the contractual grievance and arbitration provisions. The Modesto Bee negotiations with the Guild included an agreed fixed time, after annual employee reviews, when McClatchy could implement its merit pay plan there.

The Guild thereafter filed an unfair labor practice charge with the National Labor Relations Board alleging McClatchy refused to bargain in good-faith under Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5). The Board originally issued an order finding that McClatchy had violated the Act by unilaterally implementing the merit pay plan (since it amounted to an unlawful waiver of the Guild's bargaining rights). *McClatchy Newspapers, Inc.*, 299 N.L.R.B. 1045 (1990). On McClatchy's Petition for Review, the United States Court of Appeals for the District of Columbia Circuit in a *per curiam* decision, found the Board's reasoning flawed and remanded the matter back to the Board. *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153 (D.C. Cir. 1992).

On reexamination, the Board in a decision issued by Chairman Gould and Member Browning, with Member Cohen dissenting, held that McClatchy's implementation of a merit pay system at the Sacramento Bee that had no "limitations as to time, standards, criteria, and did not have the Guild's agreement" was "so *inherently* destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining." Pet. 63a (emphasis in original).[2] Member Cohen explained that the majority's rule was contrary to both the established legal principle of using economic weapons after reaching a good-faith impasse and adherence to the standard of good faith impasse as the central mechanism for monitoring the process of bargaining. *Id.* at 7. A different Board majority later determined the same considerations applied to the Modesto Bee situation, Pet. 25a, despite the agreed limitation there to merit pay being implemented only after annual employee evaluations. Pet. 28a.

On a consolidated appeal of the *Sacramento Bee* and *Modesto Bee* cases, the District of Columbia Circuit observed that the Board's second ruling was "analytically difficult." Slip op. at 18. However, it decided to enforce the Board's order by giving the Board the benefit of the doubt: "we are obliged to admit that we are unsure ourselves as to the right answer. Under these circumstances, we...defer to the Board's interpretation of the Act." Pet. 24a.

Amicus curiae adopts the facts further stated in the Petition at pages 3-12.

SUMMARY OF ARGUMENT

The circuit court below changed the line demarcating Board interference with the collective bargaining process permitted by this Court in *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952), and created a conflict in the circuit courts of appeal. In *American Nat'l Ins. Co.*, the Court reaffirmed that mandatory subjects of bar-

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[2] "a" references are to the Appendix to the Petition for Writ of Certiorari.

gaining and agreed-to terms within collective bargaining agreements are matters outside the Board's supervisory purview.

The District of Columbia Circuit has split with the Tenth Circuit in *Colorado-Ute Elec. Co. v. NLRB*, 939 F.2d 1392 (10th Cir. 1991), *cert. denied*, 504 U.S. 955 (1992). The D.C. Circuit's decision disturbs collective bargaining practices even when a good faith impasse over a mandatory subject is reached, since an employer is *no longer* free to attempt to impose the terms of its last offer.

The Petitioner succeeds in showing that reasoned agency decision making cannot characterize an employer's implementation of merit pay at impasse as a waiver of inchoate union rights.[3] Neither is it reasonable to conclude as the Board did, that implementation of a merit pay plan devoid of standards is "inherently destructive" of union representational rights, since the statute does not prohibit the proposal and McClatchy bargained in good faith to impasse over the matter at both the Sacramento Bee and Modesto Bee. On that basis alone, the D.C. Circuit's opinion is at odds with its own decision in *International Paper Co. v. NLRB*, 115 F.3d 1045, 1050 (D.C. Cir. 1997), where it allowed employer subcontracting after impasse and explained that subcontracting was not "inherently destructive" of employee rights because the action did not inhibit future collective bargaining or differentiate between employees based on protected activity.

The Board's own split decision recognizes that its new requirement that contract proposals must include specific payment terms in order to implement, is novel. If the decision is allowed to stand, the Board will hold an employer guilty of bad faith bargaining whenever it chooses to implement a proposal to retain discretion

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[3]Judge Silverman asserted no conflict existed, on the narrow view that the Tenth Circuit only considered and rejected application of the Board's union rights "waiver" theory to merit pay and not the Board's new "inherently destructive" theory. Pet. 19a.

over merit pay at impasse, after bargaining with the union over the criteria and terms of merit pay proposals.

The rulings below grant labor unions the right to control the employer's ability to implement contract terms necessary for the employer to respond to changing business conditions and emergencies, that the labor union might not appreciate and agree to. For these reasons, the Board's decision here fails to comport with this Court's precedent and Congressional intent under the Act.

These are important matters of statutory concern that this Court must grant the Petition to resolve.

ARGUMENT

AN EMPLOYER'S LONG-HELD RIGHT TO IMPLEMENT ITS MERIT PAY PROPOSAL AFTER GOOD-FAITH IMPASSE IS NOW SUBJECT TO A CIRCUIT COURT CONFLICT AND REQUIREMENTS THAT ARE CONTRARY TO THE RULINGS OF THIS COURT.

The Petitioner meritoriously argues that an employer has the right to grant merit raises after bargaining in good faith to impasse over this mandatory subject of bargaining. The District of Columbia Circuit's *sui generis* suggestion that it should allow the Board the benefit of the doubt when the Board passes judgment on every aspect of an employer's imposed wage scales, is a novel interpretation of the Act that fundamentally conflicts with *NLRB v. American Nat'l Ins., Co.*, 343 U.S. 395 (1952), and decisions in other circuits.

Two predicate considerations make the ruling below run afoul of the Labor Act. First, it is contrary to this Court's rule that the Board may not impose contract terms. Second, the D.C. Circuit, contrary to decisions in other circuits, introduced uncertainty into the law of impasse by not approving an employer's decision to implement at impasse the economic terms presented to the Union during good faith bargaining. It is precisely the certainty of this

expectation which has heretofore prompted unions to return to active and urgent bargaining, a function that by its very nature, cannot be destructive of employee rights.

I.
THE BOARD'S NEW TEST FOR PREVENTING IMPLEMENTATION AFTER GOOD-FAITH IMPASSE IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *AMERICAN NAT'L INSURANCE CO.* AND CIRCUIT COURTS IN THE THIRD, NINTH, AND TENTH CIRCUITS.

Amicus curiae submits that the District of Columbia Circuit's analysis does not comport with the basic tenets of the Court's decisions in *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952), and *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). Careful review of these decisions cannot sustain the decision of the District of Columbia Circuit.

The Tenth Circuit recognized in *Colorado-Ute*, that no legal authority supported the Board's position that the implementation of merit pay silently waived the union's right to bargain. Rather, the Tenth Circuit ruled that the Board's position that discretionary merit pay cannot be implemented at impasse would "eviscerate" one of management's "powerful economic tools for achieving its wage terms." *Id.* at 1404. Congress' purpose in requiring collective bargaining does not authorize the Board to implement or remake any contract proposal of either party not won at the bargaining table. The Board's role is to ensure that the collective bargaining process provides a forum to settle disagreements peacefully, and if not, to allow either party to achieve their objectives by resort to economic weapons. *See American Nat'l Ins. Co.*, 343 U.S. at 402-04.

Congress required bargaining only over wages and other terms and conditions of employment. 29 U.S.C. § 8(d).[4] These areas are mandatory subjects of bargaining that may be insisted upon to impasse. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Proposals on mandatory subjects of bargaining that allow the employer to retain discretion over wages and other terms and conditions of employment do not violate the Act. In *Struther Wells Corp. v. NLRB*, 721 F.2d 465 (3d Cir. 1983), *enf. denied*, 262 N.L.R.B. 1080 (1982), the Third Circuit denied enforcement of a Board decision that the company could not insist on a merit pay provision in management's "sole discretion." As in the first decision of the Board against McClatchy, the Board held that the employer could not insist to impasse upon a provision that would waive the union's right to represent employees under a merit pay plan. Therefore, the Board found that the employer's alleged bad-faith attempt to negotiate that merit pay provision prevented a valid impasse. The Third Circuit disagreed:

> It appears that the Board, by finding bad faith in these proposals, is doing exactly what it may not do. The Supreme Court has stated that "the Board may not, either *directly or indirectly*, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreement." *American Nat'l*, 343 U.S. at 404, 72 S.Ct. at 829. The Court has further stated that § 8(d) was meant to prevent the Board from controlling the settling of the terms of collective bargaining agreements.

721 F.2d at 470 (emphasis added).

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[4]Section 8(d), 29 U.S.C. § 158(d), establishes that the statutory representative has only a *duty* to meet and confer with the employer to reach an agreement. It provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment....

Similarly, in *NLRB v. Tomco Comm.*, Inc., 567 F.2d 871, 878, 883 (9th Cir. 1978), the Ninth Circuit rejected the Board's theory that a management rights clause granting management exclusive authority over such terms of employment as wage rates, incentives and bonus compensation were "'proposals clearly designed to force the Union into abandoning its *statutory rights and duties*.'" 567 F.2d at 878 (emphasis in original). The Ninth Circuit observed:

> If the point is that the Union has a *duty* of representation to its members, which forbids it to concede certain prerogatives to management, and correspondingly forbids management to insist upon these prerogatives, we find the doctrine novel. The Board cites no statutory or case law in its support.

Id. at 878-79.

The Tenth Circuit in *Colorado-Ute* followed these decisions and construed *American Nat'l Ins. Co.* by "similarly reject[ing] the Board's position that instituting discretionary wage terms necessarily abrogates, destroys or even diminishes, a union's right to bargain. To the contrary, by vigorously bargaining over how a discretionary wage clause would be implemented, an employer *vindicates* the union's right to bargain." 939 F.2d at 1403 (emphasis in original). The Board's attempt to "indirectly" control the employer's right to preserve its economic position at impasse eviscerates the employer's bargaining rights. Pet. 26a.[5]

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[5]Older cases, such as the 1948 decision in *NLRB v. J.H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir. 1948) and *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C. Cir. 1981), show how long merit pay questions have been settled. *J.H. Allison* was a case where the employer completely refused to bargain over the subject of merit raises and refused to provide the union with information concerning individual raises to unit employees in the mistaken belief that "merit raises are not proper subject matter for collective bargaining." 165 F.2d at 767. In *Blevins*, a contempt case, the D.C. Circuit explained that the employer's merit pay proposal was in fact executable "so long as it is willing to confer with the union if the wages are questioned. In other words, it need not bargain *before* it grants the raise." 659 F.2d at 1189 n.98 (emphasis in original). The D.C. Circuit's turnabout here does not prove that merit pay is a new employer tactic.

Bonanno Linen Serv. v. NLRB, 454 U.S. 404 (1982), relied upon by the D.C. Circuit below, does not compel a different result. Rather, it strengthens the view that an employer's imposition of contract terms the union has considered and rejected during bargaining, permits the employer to counter the union's economic strength by continuing to stay in business under the terms of its last offer. The employer can do so because it has faithfully engaged in the collective bargaining process. Imposition of an employer's terms at impasse is therefore an essential component of this nation's collective bargaining strategy. As the Court observed: "[a]s a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Id.* at 412.

The *Bonanno* Court held an employer could not withdraw from multi-employer bargaining because withdrawal at the time in question precluded further bargaining, contrary to the Congressional design in favor of bargaining. *Bonanno* was founded on the particular and distinct dynamics of multi-employer collective bargaining. Actual contract language was not in issue in *Bonanno*; hence, the fact patterns are as "apples to oranges." The interpretation of the Act in *Bonanno Linen*, never attempted to amend a contract term, as the Board's ruling did here with merit pay.

If labor and management cannot reach agreement on particular mandatory subjects of bargaining, then an employer has always been free to carry out its last offer in order to carry on its business. *See NLRB v. Katz*, 369 U.S. 736, 745 (1962).

However, the Board in both *McClatchy* below and *Colorado-Ute* found that because the actual granting of merit increases under the employer's program may involve substantial discretion, the union must be consulted in determining the amounts and timing of the increases in order not to gut the collective bargaining process.

Pet. 62a. This conclusion can only be true where the employer offered to give the union that right in its proposal.[6]

When the union makes no proposals to limit the employer's discretion over timing and amounts of merit increases, how can it be said that the employer either failed or refused to bargain over them? "Certainly, the Board lacks the power to compel concessions as to the substantive terms of a labor agreement." *American Nat'l Ins. Co.*, 343 U.S. at 833. Neither can the Board's remedial power set aside employment terms:

> While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based-private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

H.K. Porter Co. v. NLRB, 397 U.S. 99, 107-08 (1970).

The Court's decision in *H.K. Porter*, clearly reflected Congress' intent that the balance of economic power secured by the Act would encourage mutual bargaining. Upsetting elements of an employer's final offer will destabilize Congress' carefully constructed policy, because workers always retain the economic means to apply pressure through the statutory right to strike over any disagreement with management's proposed terms, as the Guild did here. The Board cannot interfere in this process by either taking statutorily protected rights away from employees or repositioning the economic power fulcrum to the detriment of employers.

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[6]In *Katz*, the Court distinguished the situation where the employer implemented a different economic package at impasse: "Of course, there is no resemblance between this situation and one wherein an employer, after notice and consultation, 'unilaterally' institutes a wage increase identical with one which the union has rejected as too low." *Katz*, 369 U.S. at 745 n. 12.

II.
THE EMPLOYER'S IMPLEMENTATION OF MERIT PAY RAISES UPON IMPASSE IS NOT INHERENTLY DESTRUCTIVE OF ANY STATUTORY EMPLOYEE RIGHT.

The alleged underpinning for the Board's decision is its finding that a merit pay plan devoid of unspecified standards is inherently destructive of employee rights and therefore can be forbidden. The D.C. Circuit accepted the Board's "inherently destructive" rationale at face value. Pet. 16a. It found that the employer's implementation would have "foreseeable consequences" to employees as the term was used by this Court in *Great Dane Trailers Inc. v. NLRB*, 388 U.S. 26 (1967). In *Great Dane Trailers*, the employer refused to grant vacation benefits to striking workers, but provided them to nonstriking workers and striker replacements. The discriminatory application of benefits to differing classes of employees, led this Court to hold the employer had not explained legitimate business reasons for its conduct.[7]

What the Court did explain in *Great Dane Trailers*, which the Labor Board and the D.C. Circuit avoided confronting, was that to be "inherently destructive" the discriminatory conduct against and among employees under Section 8(a)(3) must have been foreseeable and intended. 388 U.S. at 33. The Court referred directly to *NLRB v. Brown*, 380 U.S. 278, 287 (1965), where the Court held that an employer's lockout and hiring of temporary replacements resulted in "comparatively slight" harm to employee rights in contrast to "inherently destructive" conduct. The Court found that the use of temporary replacements would have but a "remote" effect on the discouragement of union membership, and that the device "constitutes a measure reasonably adapted to the effectuation of a legitimate business end." *Brown*, 380 U.S. at 288.

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[7]The Court found it "unnecessary" to rule whether the employer's action in the case was "inherently destructive" because the employer had presented "no evidence of legitimate motives for its discriminatory conduct." *Great Dane Trailers*, 388 U.S. at 34.

The possibility of employee "dissatisfaction, with its resultant pressure on membership, attributable to the fact that the nonstruck employers remain in business with temporary replacements is comparatively insubstantial." *Id.* Furthermore, "at most the union would be forced to capitulate and return its members to work on terms which, while not desirable as hoped for, were still better than under the old contract." *Id.* at 289.

In contrast to *Great Dane Trailers* and *Brown*, the Labor Board uses the Court's observation superficially to illustrate the possible woes facing the Guild. That is, the Guild's inability to bargain knowledgeably on unit wage rates and inability to explain merit wage changes to employees would "disparage the Guild by showing, despite its resistance to this proposal, its incapacity to act as the employees' representative in setting terms and conditions of employment." *See* Pet. 64a.

But, the disparagement identified by the Board here is no different in character from situations where the union might have no choice but to capitulate and return to work. Here, McClatchy's implementation of merit pay compelled the Guild to strike, but then brought the Guild back to the bargaining table to negotiate terms for a new collective bargaining agreement. This is no different then *Brown*, where the "membership, through its control of union policy, could end the dispute and terminate the lockout at any time simply by agreeing to the employers' terms and returning to work on a regular basis." *Brown*, 380 U.S. at 289.

The Board's careful avoidance of this Court's "inherently destructive" decisions, is highly suspect. The D.C. Circuit rests its enforcement order on accepting the Board's *sui generis* determination that the implementation of merit pay is "inherently destructive" of employee rights. 16a. Yet, a different panel in the D.C. Circuit carefully rejected similar use of the "inherently destructive" construct by the Board in *International Paper Co. v. NLRB*, 115 F.3d 1045 (D.C. Cir. 1997).

There, the Labor Board argued that the employer's implementation of a proposal to subcontract the jobs of locked out maintenance

workers, for which it had bargained in good faith to impasse, was "inherently destructive" of employee rights. Like the merit pay proposal here, the proposal to implement a subcontract was lawful. The D.C. Circuit, in that situation, concluded that having fulfilled its bargaining obligations before impasse, the employer's implementation of its proposal did not place it into an "inherently destructive" category of cases. *Id.* at 1049. Recognizing that the "distinction between substance and process in collective bargaining" is the linchpin for inherently destructive conduct, the D.C. Circuit emphasized that "employees are guaranteed the 'right to bargain, not [the] right to a bargain.'" *Id.*; *International Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756, 753 (D.C. Cir. 1988).

The *International Paper Co.* panel rejected the Board's contentions that entering into the subcontract would send a message to employees that bargaining was futile, that it would severely harm Section 7 rights and create a visible obstacle to the future exercise of employee rights. *Id* at 1050. Indeed, the panel expressly noted this Court's decisions, "all of which found employer conduct to be inherently destructive where the employer differentiated among members of the bargaining unit. IP's conduct does not fit the mold." *Id.*

It has been the Board's long-standing position that implementation of a merit pay proposal does not constitute a destruction of union rights. *Southern Wipers, Inc.*, 192 N.L.R.B. 816 (1971). There, it was argued that management's reservation of the right to grant merit increases was also a waiver of the union's right to bargain, and upon impasse, that merit raises could not be granted. The Board held this argument was unpersuasive because the employer was refusing to give in to the union's position and it was not required to. *Compare Chevron Chemical Co.*, 261 N.L.R.B. 44, 110 L.R.R.M. 1005 (1982) (finding no violation when employer implemented merit wage increases).

Having deviated from longstanding interpretation of the Act, the burden is on the Board to explain why the creation of a new union right which would upset the law of impasse, is a feasible interpretation of the Act, especially when the Court has not accepted

any such extreme limitation on management's right to continue its business. *See NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 343-44 (1939) (employers have no obligation to maintain status quo until union is ready or willing to bargain). In fact, McClatchy was bargaining with the union only over wages at the time impasse was reached. McClatchy bargained vigorously over the wage proposal and did not seek the right to bargain individually with employees. The union, as vigorously, refused to agree to McClatchy's proposal.

The Petition correctly identifies a circuit conflict on an important issue necessitating review and resolution. Clearly, the Board's decision affects COLLE's employer members nationwide and has ignited a troublesome issue central to the administration of the Act. Because the Board is continuing to interpret the Act inconsistently and in spite of the Tenth Circuit's adverse ruling, the Court may properly grant certiorari to reverse.

III.
THE LABOR BOARD LACKS AUTHORITY TO INVALIDATE MERIT PAY RAISES ON THE BASIS THAT IMPLEMENTATION EITHER DESTROYS OR DISPARAGES THE UNION'S REPRESENTATIONAL STATUS TOWARDS THE BARGAINING UNIT.

Employers go to the bargaining table every day with proposals on wages, subcontracting, and management rights. If this decision stands, upon good faith bargaining and impasse, no employer can assuredly implement its final offer unless the employer's proposal contains detailed standards which the Board now requires—notwithstanding this Court's holding to the contrary. This predicament amounts to nothing less than the Board setting employment terms on behalf of the union, whether a union may find the terms beneficial or not.

As in *American Nat'l Ins. Co.*, where the Board attempted to compel redaction of a management functions clause in a collective bargaining agreement, the Court found that the Board had crossed the line of its statutory authority by forbidding flexible bargaining over mandatory terms:

> Ignoring the nature of the Union's demand in this case, the Board takes the position that employers subject to the Act must agree to include in any labor agreement provisions establishing fixed standards for work schedules or any other condition of employment....Bargaining for more flexible treatment of such matters would be denied employers even though the result may be contrary to common collective bargaining practice in the industry. The Board was not empowered so to disrupt collective bargaining practices.

American Nat'l Ins. Co., 343 U.S. at 408.

Consistent with this ruling, the Tenth Circuit considered the same argument made by the D.C. Circuit and rejected the Board's refusal to allow Colorado-Ute to implement its merit raise proposal on the grounds it was "fundamentally at odds" with the law of impasse. Pet. 26a. The D.C. Circuit's attempt to compare the imposition of McClatchy's merit pay plan as akin to an employer imposing a no-strike clause on a union at impasse, is an incorrect analogy.

The employees' statutory right to strike is explicitly not conditional on any other labor law principle. *See* 29 U.S.C. § 163. Bargaining over that right is not specifically required as part of the bargaining duty of an employer and union under section 8(d) of the Act. The right to strike may, however, be exchanged by the union as the *quid pro quo* for a grievance-arbitration clause, *Reichold Chemicals, Inc.*, 277 N.L.R.B. 639, 640 (1985), or as a condition of reaching agreement. *Shell Oil Co.*, 77 N.L.R.B. 1306, 1308 (1948). The same is true for merit pay; the union may bargain over it for another benefit.

In *Reichold Chemicals, Inc.*, the Board reversed an ALJ determination that an employer's attempt to obtain a no strike clause during bargaining was only a permissible subject of bargaining, rather than a mandatory subject of bargaining. In reaffirming it to be the latter, the Board stated the oft-repeated warning it "will not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics." *Id.*, 277

N.L.R.B. at 640; *A.M.F. Bowling Co.*, 314 N.L.R.B. 969, 973, 974 (1994) ("a party may stand firm by a bargaining proposal legitimately proffered") ("assessing the appropriateness of the substantive terms of its bargaining proposals. That the Board may not do"). In *Shell Oil Co.*, the Board refused to find that the employer's insistence on a no-picketing clause was impermissible or unlawful "in the spirit of honesty and good faith required by the Act." *Id.*, 77 N.L.R.B. at 1308.

These prior Board cases are very different from the impasse situation reached by McClatchy, since in each case, the union attempts to reverse unsuccessful negotiations. *McClatchy* is also a 180° turnaround from *Southern Wipers, Inc.*, 192 N.L.R.B. 816 (1971), where the Board allowed imposition of merit raises when no evidence of bad faith bargaining existed.

Even after McClatchy conveyed the merit raise results to the union before their payment, the Board insists that McClatchy negotiate again over the increases and whether a dissatisfied employee could approach the employer. As for timing of the increases, the Guild achieved such a concession at the Modesto Bee. The Modesto Bee agreement proves that merit pay procedures are amenable to collective bargaining and the Guild may obtain the concession through its successful application of economic power, *viz.*, the strike or the threat of strike. The Board's order mandating certain terms for merit pay under the facts here, is not supported by the record or caselaw.[8]

In *American Nat'l Ins. Co.*, the Board had held that the employer's insistence on a strong management rights clause was not

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[8]In *Colorado-Ute*, the Tenth Circuit specifically rejected the D.C. Circuit's legal premise that the right to bargain requires that "economic terms of particular merit increases, rather than a general proposal" be presented to the union. 939 F.2d at 1401. The Tenth Circuit resolved the matter by adhering to this Court's ruling in *American Nat'l Ins. Co.*, that employers are not required to "'include in any labor agreement *provisions establishing fixed standards for work schedules or any other conditions of employment*.' *Id.* at 408, 72 S.Ct. at 831 (emphasis added)." *Colorado-Ute*, 939 F.2d at 1402.

only evidence of bad faith bargaining, but was by itself a violation of the Act. In reversing, this Court reasoned, "[i]f the Board is correct, an employer violates the Act by bargaining for a management functions clause touching any condition of employment without regard to the traditions of bargaining in the particular industry or such other evidence of good faith...." *Id.* at 407. Petitioner McClatchy's argument harks back to this position affirmed by the Court, that an employer might bargain for discretion to impasse and not the logical consequence "whether the employer may implement that discretion once an impasse is reached." Pet. at 14. In dispositive language, the Court stated: "The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case." *Id.* at 409.

The union met and conferred with McClatchy on wages, but was unable to achieve its bargaining objective to embed "fixed standards," *American Nat'l* at 408, by economic means and persuasion. Having failed at the negotiating table, the Board improperly attempts to force a different bargain from McClatchy, one that McClatchy never offered to the Guild.

Under well-established rules of collective bargaining, a union need not accede to a management proposal and may always engage in adverse economic activities to attempt to persuade management otherwise. *See Machinists v. Wisconsin Employment Relations Comm.*, 427 U.S. 132 (1972) (neither the union or the Board is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful."). However, that ability to persuade the employer by strikes and other means does not equate to a right to prohibit management from implementing proposed contract terms after a well-founded, good-faith bargaining impasse. Neither does the Board explain what overriding interest of collective bargaining will be vindicated by resolution in the Guild's favor nor where the Board's jurisdiction to interfere will end. Since none of these considerations are addressed by the Board, important labor law interests are jeopardized. The writ should be granted.

IV.
APPLICATION OF THE BOARD'S NEW IMPASSE RULE DEMONSTRATES THAT THE *McCLATCHY* DECISION IS INTENDED TO THWART AN EMPLOYER'S NEED FOR FLEXIBLE WAGE TERMS.

Since issuance of the Board's decision in this case, the Agency has broadly interpreted its holding not only to find that an employer cannot implement a discretionary merit pay plan after impasse, but that bargaining for a broad discretionary merit pay plan is bad-faith bargaining.

An example is *Detroit Newspapers*, Case 7-CA-37361, 1997 NLRB LEXIS 501 (1997), where an ALJ found the employer's proposal for a continuation of discretionary merit pay (based on performance evaluations) to be in bad-faith, post-*McClatchy*, because the employer did not have a formula setting forth specific factors that it would rely upon. The ALJ concluded that the employer "breached its good-faith obligations" because "such information was reasonably implied" and "influencing factors" should have been produced and supplied to the union. *Id.* at *248-49. *Also Liquor Ind. Bargaining Gp.*, 1997 NLRB LEXIS 271 at *105 (1997) (employer's insistence to retain control over the criteria, timing, and procedures for implementing merit pay is now evidence of bad faith bargaining).

The Board's General Counsel has also issued a Memorandum explaining the Board's purpose in *McClatchy Newspapers*, in *Bud Antle, Inc.*, Case No. 32-CA-15269, 1997 NLRB GCM LEXIS 2 (1997). There the General Counsel contends that employers now have a "duty to bargain over procedures and criteria" because merit pay without these terms, disparages the union in the "eyes of unit employees," and makes the union unable to "bargain knowledgeably" and explain wage rates to employees. *Id.* at *15-16. This explanation underscores the need for the Court's supervisory review, because the Board's highly questionable assumption of authority now forces employers into offering specific merit pay terms or otherwise face bad faith bargaining charges whenever they endeavor to maintain exclusive control over merit pay terms. The

Board's position begs the question, what other mandatory subjects of bargaining will the Board also demand that employers embellish with standards?

The result of the *McClatchy* decision is to make the Board the union's partner in writing terms and conditions of employment, and granting the union veto power over implementation of a mandatory term of collective bargaining after impasse. The Board's decision upsets the careful economic balance set by the Congress in establishing full freedom of contract in the making of collective bargaining agreements. This case presages further interdiction by the Board into the bargaining process.

The Petition should be granted to remedy this grave departure from national collective bargaining principles.

CONCLUSION

For the reasons set forth above, *amicus curiae* Council on Labor Law Equality respectfully requests that the Petition be granted.

Respectfully submitted,

Gerard C. Smetana*
SMETANA & AVAKIAN
39 South La Salle Drive, Suite 1218
Chicago, Il 60603
(312) 357-0250

Attorney for Amicus Curiae
Council on Labor Law Equality

May 15, 1998

*Counsel of Record